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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1973

No. 73-358

WILLIAM ALLEN JONES AND WIFE,
BOBBIE JONES

PETITIONERS

VS.

CREDIT BUREAU OF NASHVILLE

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, William Allen Jones and wife, Bobbie Jones, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on May 30, 1973. (Appendix infra).

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. This opinion is, however, set forth in the Appendix, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1973 (App. infra, P. 14)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Your petitioner respectfully shows:

I.

The question for determination is, whether Petitioners were denied a fair and impartial trial by the District Trial Court, due to prejudicial attitudes, words and actions of the Court communicated to the jury both in open Court and through the news media; and whether the verdict of the jury, wherein it found as a fact that "Yes" Plaintiffs on November 5, 1971 had properly identified themselves, as required by the new Fair Credit Reporting Act (15 U.S.A. Sec. 1681g), had per se required an answer of either that Defendant had negligently failed to disclose to Plaintiffs all information in its files on the Plaintiffs, or wilfully failed to disclose said information; there being no real question of fact as to the failure to disclose since Defendant's own witness admitted that she told them No, you cannot see the file. It is not our policy. (R.122) Therefore, if you ask a jury to answer whether Defendant "negligently" or "wilfully" failed to disclose information, it must by process of elimination decide of which type of failure to disclose Defendant is guilty and whether punitive damages would lie as provided for in 15 U.S.C. 1681N Civil Liability for Wilfull Non-Compliance, rather than merely compensatory damages if it were negligent non-compliance.

Even pending trial of this case Petitioner William Allen Jones in good faith went back to the Credit Bureau to see about a financing matter that the lender needed a credit report on Petitioner William Allen Jones, and though polite to him, the Defendants' representative said the file wasn't there and on their Attorney's advice until case was decided, they couldn't do anything involving their file and Petitioners believed that money lost on this transaction should have been part of damages flowing from Defendants' violation of the Act. (R.p.28)

The United States District Court For the Middle District of Tennessee, upon receiving the answers to the questions proposed to the jury, entered a judgment for the defendant. (R.177)

The United States Court of Appeals For the Sixth Circuit held that "the judgment of the District Court on the verdict and the order of the District Court denying Appellants' motion for a new trial be, and it is hereby, affirmed." (Appendix, infra.)

The decision of both the District Court and the Court of Appeals is in conflict with the clear and cogent intent and purpose of The Fair Credit Reporting Act, 15 U.S.C. 1681 et seq. and this being to the best of Petitioners' knowledge the first case involving this new act to be appealed, they believe that construction and interpretation of this Act is greatly needed to provide Consumers and Credit Reporting Agencies with necessary guidelines for the implementation of said Act. They also firmly believe that both the District Court and the Court of Appeals were in error in their interpretation and construction of the Act and the jury verdict's relation thereto.

II.

SUMMARY STATEMENT OF THE MATTERS INVOLVED:

This suit was commenced in the United States District Court For the Middle District of Tennessee, Nashville Division by Petitioners, who claimed that Defendant's refusal to let them see their file violated their rights under the Fair Credit Reporting Act, as set forth in 15 U.S.C. Sections 1681-1681 (t), to see their credit files and have corrected any erroneous information therein, and to obtain compensatory and/or punitive damages resulting therefrom.

Defendant answered, and denied any violation of the Fair Credit Reporting Act and alleged that Petitioners never properly identified themselves and therefore Defendant could not disclose information in their file and Defendant further alleged that Petitioners had not suffered any damages whatsoever as a result of any action or inaction on the part of the Defendant and denied that it owed Petitioners any money compensatory or punitive, or costs or attorney's fees.

The case was heard by a jury of six members. At the end of all proof at about 4:00 P.M. a motion for directed verdict in favor of Defendant, Credit Bureau of Nashville, was made after the jury had been excused. After some discussion by the Court, Counsel for Plaintiffs, William Allen Jones and wife, Bobbie Jones, and Counsel for the Defendant, Credit Bureau of Nashville, the Court took a recess to determine whether to let the case go to the jury or to grant the motion for a directed verdict. (R. 151 & 152)

After the recess the Court advised that he was going to let the case go to the jury solely on the incident involved at the time of the demand to see the Credit Report on November 5, 1971 and the damages directly flowing from that failure to permit Plaintiffs the inspection of the records on November 5, 1971. It was to be purely and simply the technical violation of 15 U.S.C. Sec. 1681 (n) and 1681 (o), and the Court said that if the jury determines that the Defendant, Credit Bureau of Nashville, has violated the Act, the jury will be permitted to fix the compensatory damages and the Court will reserve the right to fix, in accordance with the language of the statute, Attorney's fees and Court costs and punitive damages. (R. p. 152)

The Court instructed the jurors as follows, and adjourned for May 30, 1972 at 4:59 P.M.:

"You can go home and come back in the morning at 9:00 o'clock. We will terminate this case in the morning. Do not discuss this case among yourselves; do not discuss it with anyone. That includes husbands, wives, brothers and sisters. They are people too, and when you come back in the morning, don't discuss it with anybody. The first discussion you will have is when you get out in the jury room after argument of counsel and the charge is given you by the Court." (R. p. 153)

The Court convened at 9:05 A.M. May 31, 1972, and advised the jury that, "it is your responsibility to determine, first, whether the Plaintiffs properly identified themselves, that is

your first issue. The second is, whether or not the Defendant, after they (Plaintiffs) had properly identified themselves, if they did, negligently failed to disclose all the information. Number three, if the Plaintiffs properly identified themselves did the Defendant wilfully fail to disclose the information?" (R. pp. 156, 157)

Closing argument by Mr. Meacham on behalf of the Plaintiffs, closing argument by Mr. Stewart on behalf of the Defendant and closing argument in rebuttal by Mrs. Bobbie Jones on behalf of Plaintiffs was heard.

The Court then charged the jury as to the law applicable to this case both evidentiary and statutory.

The jury retired to deliberate on the verdict at 10:06 A.M. May 31, 1972 and returned their verdict at 11:33 A.M. May 31, 1972 as shown on the verdict form:

No. 1–Did the Plaintiffs properly identify themselves to the Defendant at the time they demanded information?
Answer, YES.

No. 2–Did the Defendant negligently fail to disclose to Plaintiffs all information in its files on the Plaintiffs?
Answer, NO.

No. 3–Did the Defendant wilfully fail to disclose to Plaintiffs all information in its files?
Answer, NO. (R. p. 176)

The Court stated "all right, a verdict for the Defendant will be entered and you may be excused and you may leave at this time and you will be notified when to return." (R. p. 176 & 177)

Petitioners within time allowed filed a Motion for New Trial wherein they stated grounds that:

1. **The verdict is contrary to the Law;**

2. **The verdict is contrary to the evidence;**

3. **That prejudicial remarks of the Court, when the Jury was excused to allow discussion of Defendant's Motion for a Directed Verdict at end of all proof, were published in the Nashville Tennessean the morning of May 31, 1972 and the newspaper which has a wide public distribution, was available to and was seen by the jurors in this case prior to the final deliberations and rendering of their verdict;**

4. That the phrasing of the questions answered by the jury was confusing to the jury;

5. That the Court erred in declaring the answers to them by the Court to be a verdict in favor of Defendant due to inconsistency of question No. 1 being answered "YES" and both of the other questions being answered "NO";

6. That petitioners were denied a fair and impartial trial by actions and attitude of the Court in conducting the trial as shown by his statements, among others, "that I think the whole lawsuit is ridiculous." and which remarks were communicated to the jurors by the news media.

On June 15, 1972 said Motion for a New Trial was denied without oral argument, the Court stating that it is "of the opinion that oral argument would not be helpful. There is no rule of this Court requiring such a hearing." (Appendix, infra)

Petitioners feel that this is indicative of the Court's prejudicial attitude toward their case which pervaded and permeated the entire trial and denied them a fair and impartial trial.

In time allowed Petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit and on May 30, 1973 said Court of Appeals held that "the judgment of the District Court on the verdict and the Order of the District Court denying Appellants' Motion for a New Trial be, and it is hereby, "affirmed." Said Court of Appeals stated in said Order that "the Court is of the opinion that, although we strongly disapprove of the comments made by the Court, we do not find them to have been prejudicial to Appellants." (Appendix infra)

The principal questions involved on said appeal may be summarized as follow:

1. Did the District Court misconstrue the Fair Credit Reporting Act when it rendered its judgment interpreting the answers to the questions submitted to the jury to be a verdict for the Defendant?

2. Were the petitioners denied a fair and impartial trial by prejudicial words, actions and attitudes of the Court, which were communicated to the jury in open Court by his taking over almost completely the questioning of petitioners' witnesses thereby effectively disorganizing or destroying petitioners' attorneys' efforts to conduct and present a proper case to the jury?

3. Were the petitioners denied a fair and impartial trial by remarks of the Court out of presence of the jury being available to and communicated to jurors by the news media prior to rendering their verdict?

These questions were decided by the United States Court of Appeals for the Sixth Circuit in favor of the defendant and not in accord with the clear meaning of the Fair Credit Reporting Act, 15 U.S.A. 1681 (t). Their decision also is not in accord with applicable decisions relative to the District Court's words and actions in conducting the trial.

Briggs vs. The United States (C. A-6 Tenn.) 22IF2d 636

Meyer vs. Cadwalader 49F32

Marshall vs. The United States, 360 U.S. at 312-313, 79 S. Ct. at 1173, 3L. ED. 2d at 1252

U. S. vs. McKinney (5 C.A.) (1970) 429 F2d 1019 at page 1224

Quercia vs. United States, 289 U.S. 466 at page 470, 63 S. Ct.697 at page 699, 77 L. ED. 1321

III.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1st. In Conflict with the clear intent, purpose and meaning of the Fair Credit Reporting Act 15 U.S.C. 1681-1681 (t).

The decision of the District Court, as affirmed by the Court of Appeals for the Sixth Circuit, misinterprets and misconstrues The Fair Credit Reporting Act, which at 15 U.S.C. 1681 (g) says mandatorily that "Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1.) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request, and said Act at 15 U.S.C. 1681a subsection (g) states: "The term 'file', when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

When the jury held that "Yes", petitioners did properly identify themselves to that Defendant at the time they demanded information, the mandatory words of the statute, (shall . . . disclose) required that all information in Defendant's files at the time of the request "shall" be disclosed to petitioners.

Blankenship vs. State, 443 SW. 2d 442, 223 Tenn, 158 et seq. at page 165 stated, "In other words, penal statutes, which use the word "shall" and then provide a penalty for failure to do what is required, are universally classified as mandatory statutes."

Also the word "shall" as used in constitutions or statutes is ordinarily construed as being mandatory and not discretionary or directory.

U.S. vs. Machado, D.C. Cal. 306 F. Supp. 995, 997

Stubbs vs. State, 393 SW 2d 150, 216 Tenn. 567

Louisville and N.R.Co. vs. Hammer, 236 SW 2d 971, 191 Tenn. 700.

Petitioners firmly believe that to allow this verdict to stand as a precedent under the new Fair Credit Reporting Act would be to, in effect, totally emasculate the Act and allow the Credit Reporting Agencies to point to it and say in effect that they still could not be regulated nor required to disclose information in a consumer's file and to get it corrected or cleared up and be able to obtain things that credit would permit.

Petitioners believe that in its ruling on the jury verdict, the District Court, which was affirmed by the Court of Appeals for the Sixth Circuit, did not take this Fair Credit Reporting Act seriously enough and made an erroneous, snap judgment. This important construction and interpretation of a new Federal law, The Fair Credit Reporting Act, has not been, but should be settled by this Supreme Court of the United States.

Petitioners believe that the only proper interpretation of the verdict of the jury, hereinbefore set forth, was that "Yes", there was proper identification and therefore it was mandatory that the Credit Bureau of Nashville disclose all information in its file at that time and since there was admittedly no disclosure of information, the Credit Bureau was guilty of a wilful failure to disclose to Petitioners rather than a negligent failure to disclose and punitive damages should be assessed.

2nd. Congress undoubtedly placed jurisdiction of the violations of the Fair Credit Reporting Act in Federal Courts rather than in local state courts because the U. S. District Court and members of its juries, who are usually from a greater area, are less subject to the influence of the local Credit Bureaus and credit reporting agencies, that have power over each individual's future through control of his accessibility to credit for the vital essentials, such as food, clothing, home, car, medical care, etc.

The District Court's prejudicial words, actions, and attitudes clearly indicated that he was impatient with the Act that put jurisdiction in his Court and that he didn't think this type action was substantial enough for him to spend his time on. Petitioners believe that he thus lost sight of the prime purpose and intent of the Act and has so far departed from the accepted and usual course of judicial proceedings that Petitioners were deprived of a fair and impartial trial and that the Court of Appeals for the Sixth Circuit in its affirming said lower court's ruling so far sanctioned such a departure by a lower court, as to call for an exercise of this Supreme Court's power of supervision.

The District Court's remarks, referred to above, with the jury in Court and those (out of jury's presence) published in the news media indicated very strongly and clearly the prejudicial attitude of the Court toward Plaintiff's case and coupled with the fact that the jury had every opportunity to see this article and some, in fact, stated they had seen the article. In this connection the following statement in *Briggs vs. The United States* (Ca6Tenn) 221 F2d 636 and *Meyer vs. Cadwalader* 49F32 is much in point:

"It is idle to say that there is no direct evidence to show the jury read these articles. They appeared in the daily issues of leading journals, and scattered broadcast over the community. The jury separated at the close of each session of the Court, and it is incredible that going out into the community, they did not

see and read these newspaper publications. That these published statements were well calculated to prejudice the jury is a proposition so plain that it would be a sheer waste of time to discuss it."

As said by Chief Justice Hughes in *Quercia vs. United States,* 289 U.S. 466, at page 470, 63 S. Ct. 698 at page 699, 77 L.ED 1321:

"The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his highest word of intimation is received with deference and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'."

Also in granting a new trial in *Briggs vs. The United States* (supra) and in *Stone vs. The United States* (6 Cir) 113 F2d70, 77 the Court said that "the question is not whether any actual wrong resulted under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice."

In *U.S. vs. McKinney* 5th C.A. (1970) 429-F2d1019 at page 1224, the Court said:

"The Marshall decision has served to accentuate the duty of the federal courts to guard against the effect of prejudicial newspaper publicity, as the Third Circuit has said, 'whatever may have been the law prior to "Marshall", since that decision it has been clear that a new trial should be granted in federal criminal cases when it is shown that members of the jury have read news accounts which include inadmissible facts prejudicial to the Defendant."

United States vs. Kun Seng Seo 3rd Cir. C.A. (1962) 300 F2d 623, 625, see also *Holmes vs. U. S.* 4th Cir. C.A. (1960) 284 F2d 716, 718 and at page 1025.

"Moreover, as the Supreme Court observed in "Marshall", the prejudice to the Defendant is almost certain to be as great when (prejudicial) evidence reaches the jury through news accounts as when it is part of the prosection's evidence . . . It may indeed be greater for it is not them tempered by protective procedures." *Marshall vs. The United States* 360 U.S. at 312-313, 79 S. Ct. at 1173, 3 L.ED 2d at 1252.

CONCLUSION

Petitioners believe that the only reasoned interpretation of the uncontroverted facts included in the questions to the jury and the jury's verdict and the verdict's application to the Fair Credit Reporting Act allows only the conclusion that Credit Bureau of Nashville was guilty per se of a violation of the Act and that the Court erred in rendering a judgment for the Defendants on said verdict. This case being to the best of Petitioners' knowledge the first case to come before this Supreme Court, they believe that it is an appropriate vehicle for this Court to set out authoritatively once and for all, the construction and interpretation of the provisions of the Fair Credit Reporting Act and to furnish thereby guidelines for both Credit Reporting Agencies and the consumers in complying with this Act and carrying out the intent and purposes for which it was enacted.

Petitioners respectfully pray that their Petition for Writ of Certiorari be granted and that the Judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court may be reversed by this Honorable Court and judgment entered in their behalf and a remand to the District Court for a hearing as to damages or that a new trial be granted; and that Petitioners may have such other and further relief in the premises as this Honorable Court may deem meet and just.

Respectfully submitted,

William Allen Jones
Bobbie Jones
By: C. Alex Meacham
Counsel for Petitioners

APPENDIX A.

In the United States District Court For the Middle District of Tennessee Nashville Division

WILLIAM ALLEN JONES and wife, BOBBIE JONES	)	
vs.	)	CIVIL ACTION NO. 6437
CREDIT BUREAU OF NASHVILLE	)	

ORDER

The Motion For New Trial is hereby denied without oral argument. The court is of the opinion that oral argument would not be helpful. There is no rule of this court requiring such a hearing.

L. Clure Morton
United States District Judge

ATTEST: A TRUE COPY
Brandon Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By: _____ D.C.

APPENDIX B

No. 72-1923

United States Court of Appeals
For The Sixth Circuit

WILLIAM ALLEN JONES AND WIFE, BOBBIE JONES	)	
Appellants,	)	
v.	)	ORDER
CREDIT BUREAU OF NASHVILLE,	)	
Appellee.	)	

Before: EDWARDS and CELEBREZZE, and O'SULLIVAN, Senior Circuit Judge.

This is an appeal from a judgment of the District Court on a jury verdict for Appellee and from an order of the District Court denying Appellants' motion for a new trial. Having reviewed the briefs and the record and upon hearing oral arguments, the Court is of the opinion that, although we strongly disapprove of the comments made by the Court, we do not find them to have been prejudicial to Appellants. Further, we find no prejudicial error in the trial.

Accordingly, it is ORDERED that the judgment of the District Court on the verdict and the order of the District Court denying Appellants' motion for a new trial be, and it is hereby, affirmed.

ENTERED BY ORDER OF THE COURT

James A. Higgins Clerk

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RESPONDENT

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Warren E. Burger, Chief Justice of the United Sfates, and the Associate Justices of the Supreme Court of the United States:

Respondent, Credit Bureau of Nashville, prays that Petitioners' Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondent concurs with Petitioners' Statement of the Case which is contained in their "Summary Statement of the Matters Involved" except for the following:

1. On page 6 of the Petition, Petitioners state that "said Motion for a New Trial was denied without oral argument, the Court stating that it is 'of the opinion that oral argument would not be helpful. There is no rule of this Court requiring such a hearing'."

In the next paragraph Petitioners' state that they feel this was indicative of the Court's prejudicial attitude toward their case which pervaded and permeated the entire trial and denied them a fair and impartial trial:

Respondent contends that Petitioners' personal feelings are an inappropriate part of their Statement of the Case in that Supreme Court Rule No. 23, 1. (e) provides that the Statement of the Case is to contain the facts material to the consideration of the questions presented. Petitioners' personal feelings are certainly not facts material to the consideration of the questions presented.

2. On page 7 of Petitioners' Petition, they state that the United States Court of Appeals for the Sixth Circuit's decision in favor of the defendant is not in accord with applicable decisions relative to the District Court's words and actions in conducting the trial. Respondent again takes the position that Petitioners' opinions are not an appropriate part of the Statement of the case as provided by Supreme Court Rule No. 23 1. (e).

3. Petitioners failed to state in their Petition as is required by Supreme Court Rule No. 23, 1 (a) (ii) that their motion asking for an extension of time to petition for certiorari was granted by the Court of Appeals and an order was entered to that effect. (Appendix A)

JURISDICTION

Supreme Court Rule No. 19, 1. states in essence that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The rule then lists several basis of jurisdiction which indicate the character of reasons which will be considered.

Rule 19, 1 (a) deals with a state court deciding a federal question. This situation we do not have in the case at bar.

Rule 19, 1 (b) lists several criteria and reads as follows:

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Petitioners' Petition states two general grounds upon which they rely for allowance of the writ. The only possible sections of (b) above under which these grounds could fall are those dealing with an important question of federal law not yet settled by this Court and a departure from the accepted and usual course of judicial proceedings. Respondent will now state why it feels that this case does not warrant a review by this Court under either of those sections.

REPLY TO PETITIONERS REASONS FOR ALLOWANCE OF THE WRIT

1. Petitioners' first ground for allowance of the writ is that the Fair Credit Reporting Act, U.S.C. 1681-1681 (t), was misinterpreted and misconstrued by the District Court and the Court of Appeals.

Respondent contends that neither the District Court nor the Court of Appeals misinterpreted or misconstrued the act and further that they did not decide an important question of federal law which has not been, but should be, settled by this Court. What we have involved in the case at bar is merely a question of applying the Fair Credit Reporting Act to the facts involved.

In the original trial held in the U.S. District Court For The Middle District of Tennessee, Nashville Division, the Court presented three questions to the jury for their determination in

deciding whether or not Respondent, Nashville Credit Bureau, had violated the Fair Credit Reporting Act. The questions and the answers of the jury were as follows:

(1) Did the Plaintiffs properly identify themselves to the Defendant at the time they demanded information; Answer; Yes

(2) Did the Defendant neligently fail to disclose to Plaintiffs all information in its files on the Plaintiffs; Answer: No.

(3) Did the Defendant wilfully fail to disclose to Plaintiffs all information in its files; Answer: No (R. 176)

15 U.S.C. 1681 h (b) requires the consumer to properly identify himself before a consumer reporting agency is required to disclose any information whatsoever. Petitioners contend that the fact that the jury answered in the affirmative to the question of whether they properly identified themselves automatically places Respondent, Nashville Credit Bureau, in violation of the Fair Credit Reporting Act. Respondent contends that a closer analysis of the facts and statute proves to the contrary.

The Petitioners went to the office of the Credit Bureau of Nashville on or about Nov. 5, 1971, walked in and stated to the Bureau's employee, Mrs. Demonbreum, that they assumed she should know who they were and demanded written copies of

their credit reports. (R. 44-45, 119). Mr. Jones was told by Mrs. Demonbreum that the Bureau does not hand the individual a copy, but that the Bureau would exhibit the records and actually go over them with the Joneses and allow them to make any notations that they might wish. Mr. Jones rather peremptorily and in a high handed manner stated, "Young lady, I believe you are mistaken," and when Mrs. Demonbreum advised them she was not and asked whether she could help them in any other way, Mr. Jones further stated, "No thank you, we will take another route," and just walked right out the door with his wife, without giving Mrs. Demonbreum an opportunity to help him in the only way in which she could and was required to help him under the terms of the Fair Credit Reporting Act (R. 119, 121)

15 U.S.C. 1681 g (a) (1) states that every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer the nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

The Act does not require that the consumer credit agency furnish written copies of its reports on files as Mr. Jones asked for, (R. 119), but merely requires that it *disclose* to the consumer the nature and substance of all information on the consumer in its files at the time. To interpret the term disclose to mean furnish a written copy would be unjustly stretching any known definition of the word. The record clearly reflects that the Credit Bureau offered to disclose all information it had on the Joneses when Mrs. Demonbreum told them that she could get their record and go over it with them and that they could make any notations they wanted to make. (R. 119)

At that time the Credit Bureau had fully complied with 15 U.S.C. 1681 (g) and the disclosure would have been made at that time had the Joneses not themselves refused to accept it and left stating they would take another route. (R. 119)

Based upon these facts and the law presented to it, the jury had no choice but to answer the questions of whether the Credit Bureau had negligently and/or wilfully failed to disclose the information in the negative. The facts had clearly shown the jury that the Bureau had offered to disclose the information but that the Joneses had refused to accept it. There was therefore no negligent or wilfull failure to disclose and a verdict was properly entered for the Credit Bureau despite the fact that the jury had found there to be a proper identification by the Joneses.

Resondent, thus, contends that the case at bar does not require the Supreme Court to interpret any portion of the Fair Credit Reporting Act. There was no important question of federal law decided in the U.S. District Court or the Court of Appeals. It was simply a factual question for the jury to decide if a proper identification had been made and if so whether the facts indicated that the Credit Bureau negligently or wilfully failed to disclose.

2. Petitioners second ground for allowance of the writ is that they were deprived of a fair and impartial trial and that the Court of Appeals in affirming the lower court's ruling so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. Respondent disagrees.

The alleged prejudicial remarks by the Court were made in the Courtroom outside the hearing of the jury late in the afternoon of May 30, 1972, at the end of all the proof in the case when the Defendant moved for a directed verdict. No further proceedings were held on that day in the presence of the jury, Court being recessed until the next morning at which time it would hear arguments and instructions of the Court before beginning deliberations. It is not seriously contended by the Joneses that the trial judge made any comment heard directly by the jurors, but is contended that an article published in the Nashville Tennessean newspaper on the morning of May 31, 1972, was available to the jury, but the only proof offered of such was Exhibit No. 2 to the Joneses' Motion for a New Trial, which is an affidavit by Mrs. Annie Wade, a juror, which states that she "heard" the remarks of the judge on her way into Court "on the morning of May 31, 1972." The affidavit does not in any manner state how she heard the remarks of the judge or how these remarks may or may not have affected her. The remarks she apparently is referring to are remarks made in the Courtroom on the *day before* when the jury was not in the Courtroom but in the jury room where they could not hear anything said in the Courtroom by anyone (Appellant's Appendix to Court of Appeals brief, p. 29-32).

The only proof that any prejudicial remarks of the trial judge may have been available to the jury was by the Joneses' Exhibit No. 4 to their Motion for a New Trial, which is an affidavit by Mrs. Emma Chappel stating that she "knew of" the newspaper article, but this affidavit fails in all respects to state whether she even knew what the remarks of the judge were, or whether they influenced her in any manner (Appellant's Appendix, p. 29-32).

If the Joneses' counsel felt aggrieved in any manner by any alleged prejudicial comment by or conduct of the trial judge, he should have called the matter to the Court's attention so as to

give the Court an opportunity to conduct an inquiry as to whether such allegations had any basis in fact, and, if so, to take corrective action. *Faudree v. Iron City Sand & Gravel Company*, (CA Pa. 1963) 315 F 2d 647.

Improper remarks alleged to have been made by a trial judge during the process of the trial, even in the presence of the jury, cannot be reviewed where no objection or exception was taken to them at the trial. *Ketterbach v. U.S.* (9th Cir. 1913) 202 F. 377 at 385.

Since the trial judge has large discretion in ruling on the issue of prejudice resulting from reading by the jurors of news articles concerning the trial, the Joneses should have moved for a mistrial, offered what proof they had on the issue and given the trial Court an opportunity to inquire into the matter and make a determination whether any prejudicial error had occurred. Prejudice because of publicity will not be presumed. *U.S. v. Wilshire Oil Co. of Texas*, 282 F. Supp. 902, Affirmed 427 F 2d 969, cert. den. 91 S. Ct. 58, 400 U.S. 829, 27 L.Ed. 59 (D.C. Kan. 1968).

A party may not sit idly by and allow the trial Court to commit error, wait for a verdict and complain of the error only if the verdict is unfavorable. If counsel believed that prejudicial error had occurred, he should have moved for a mistrial and presented what evidence he had to indicate a mistrial was in order. *Skogen v. Dow Chemical Co.* (CA Minn. 1967) 375 F2d 692.

Although cautionary instructions will not always cure error, such an instruction is important in weighing all factors to determine whether action of the trial court adversely affected rights of the litigants. *Id.*

Where no objection was taken to alleged prejudicial remarks made by the court, the Court of Appeals could not consider such remarks on appeal though allegedly if the objection had been made to the remarks of the trial court, that court would have made further and possible more damaging statements to the jury. *Dowell, Inc. v. Jowers* (CA 5th 1950) 182 F2d 576.

A new trial may not be granted one who with knowledge of jurors' misconduct fails to make objections, and, when motion for a new trial is urged on the ground of the misconduct on the part of jurors, the movant must aver and show that he and his counsel were ignorant of the misconduct until after the return of the verdict. *U.S. v. Kansas City*, (CA Mo. 1946) 157 F2d 459.

The record in the instant case is devoid of any objection or exception made or taken to anything said by the trial judge or printed in the newspapers. Nor do the affidavits of the two jurors state that those jurors read the newspaper article. The Court said in *U.S. v. Carlucci*, 288 F2d 691 (3rd Cir.) cert. den. 366 U.S. 961, 81 S. Ct. 1920, 6 L. Ed. 2d 1253 (1961), in essence, that the doctrine of the U.S. Supreme Court in the *Marshall* opinion relied upon in the Joneses' Petition is not that juries must be sequestered every time there is a possibility that the trial may gain publicity in the newspapers which could be prejudicial to one of the parties. The questioned jurors in the *Carlucci* case admitted that they had seen certain newspaper stories, but upon being quizzed by the trial judge, certain of the jurors stated that they had only glanced at the headlines of the newspaper and did not read them to remember them. The Court refused to order a new trial.

Certainly, much more must be shown than the mere fact that one juror had "heard of" remarks of the trial judge and that another juror "knew of" the newspaper article before this case could be reversed.

Respondent thus contends that if there was any error made by the trial court, Petitioners failed to object to it at the proper time and cannot now come before the Supreme Court and say they were prejudiced. Further, we agree with the ruling of the Court of Appeals when it said that any comments made by the Federal Court were not prejudicial to the appellants (Petitioners Appendix p. 15). We contend that the Petitioners have failed to show that they were in any way prejudiced in that there is nothing in the record indicating that any juror was influenced by any comments made by the Federal Court or that any of them actually knew what the substance of any of the Court's comments was.

CONCLUSION

Petitioners have failed to state a sufficient reason for this Court to grant a writ of certiorari. As set out in the brief above there is no Federal law involved which needs interpretation nor is there any prejudice shown that resulted from any actions of the trial court. Any objection to the trial court's comments or actions should have been made at the time of the trial, not sometime thereafter. Petitioners indisputably failed to do this.

DAMAGES

Assuming the Credit Bureau was in violation of the Fair Credit Reporting Act, which Respondent strongly contends it was not, the Petitioners have failed to prove any damages whatsoever. There is nothing to indicate that their failure to obtain the information from the Credit Bureau, on Nov. 5, 1971 resulted in any harm or damage to them.

All that was involved in this case was a question of fact for the jury to decide, and after hearing all the evidence the jury found that the Credit Bureau did not negligently or wilfully fail to disclose information. The proof showed the the Bureau did in fact offer to disclose but that the Joneses left without giving it an opportunity. This proof is clearly consistent with the jury verdict and Petitioners have shown no reason for the jury's decision or the Court of Appeals' affirmation of that decision to be reviewed by this Court. This Court has consistently taken the position that it will accept the concurrent findings of the District Court and Circuit Court of Appeals on a question of fact if supported by substantial evidence and absent obvious and exceptional showing of error. *Graver Tank & Manufacturing Co. v. Lende Air Products Co.*, 69 S Ct 535, 336 U.S. 27, 93 L. Ed. 572; *Berenyi v. District Director, Immigration and Naturalization Service*, 87 S Ct 666, 385 U.S. 630, 17 L. Ed. 2d 656.

There not being a question before this Court which warrants the granting of a writ of certiorari, Respondent respectfully submits that the writ should be denied.

Respectfully submitted,

H. Francis Stewart

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM ALLEN JONES and wife, BOBBIE JONES, Appellants,	)	
VS.	)	No. 72-1923
CREDIT BUREAU OF NASHVILLE, Appellee	)	

MOTION

Comes the Appellants, WILLIAM ALLEN JONES and wife, BOBBIE JONES, and move this Honorable Court to grant an extension of its staying of the mandate in this case from August 11, 1973 to and including August 28, 1973. Appellants Counsel has almost completed the Writ of Certiorari and brief but needs the additional time requested to get them printed and filed with the Supreme Court of the United States.

/s/ C. Alex Meacham
Solicitor for Appellants

I hereby certify that I have this August 7, 1973, mailed to H. Francis Stewart, Attorney for Credit Bureau of Nashville a copy of this motion.

Motion Granted:

/s/ Anthony J. Celebrezze
U. S. Circuit Judge